IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4697 OF 2007

Mrs. Charu Kishor Mehta ....Petitioner
V/s
Lilavati Kirtibai Medical Trust & Ors.... ....Respondents.

Mr.N.H.Seervai, Sr. Adv. i/by Mr.T.N.Tripathi & Co., Adv. For the petitioner.

Mr.Mahesh Jethmalani with Mr.M.S.Doctor, Mr.Norruddin Dhila & Ms.Aaradhana Bhansali & Mr.Shane Sapeco i/by M/s.Hariani & Co. Adv. For respondent Nos. 11, 12 & 13.

Mr.Rafiq Dada, Sr. Counsel with Mr.G.S.Godbole i/by M/s.Nankani & Associates for respondent No.1.

Mr.Virag Tulzapurkar, Sr. Counsel with Mr.Bipin Saraf i/by M/s.M.K.Banatwala & Co., for respondent NO.3.

Mr.S.G.Aney, Sr. Counsel i/by M/s.Haresh Mehta & Co. for respondent No.4.

Mr.P.K.Samdani, Sr. Counsel with Mr.C.S.Kapadia i/by Mr.M.G.Gawde for respondent No.10.

CORAM: A.P.DESHPANDE, J.
6/9/07

PC:

The suit out of which this writ petition arises is filed by one Mrs.Charu Kishor Mehta the present petitioner. The dispute in the suit relates to the administration of a Trust named Lilavati Kirtilal Mehta Medical Trust which runs and manages Lilavati Hospital. The challenge in

the suit is to a notice dated 27.4.06 issued for convening meeting of the trustees on 29.4.06. The plaintiff has sought a declaration that the resolution allegedly adopted in the meeting is illegal and void. Besides seeking said declaration other incidental reliefs are also claimed. The defendant No.11 in the suit is the husband of the plaintiff and defendants 12 and 13 are their children. The said defendants were impleaded by way of amendment to the plaint. The defendant No.11 filed his separate written statement whereas defendant Nos. 12 and 13 filed joint written statement. The defendants 11, 12 and 13 are supporting the plaintiff. The contesting defendants as well filed their written statement and opposed the claim made in the suit. Issues were framed on 3.5.07 and the suit was adjourned to 4.5.07 for the purpose of submission of list of witnesses. Parties tendered their respective list of witnesses and the same are taken on record on 5.5.07. On 5.5.07 the plaintiff was directed to furnish copies of affidavits of examination in chief of herself and her witnesses on the contesting defendants a week before the commencement of evidence. Suit was fixed for evidence on 4.6.07. The plaintiff moved an application on 4.6.07 for adjournment and thus suit came to be adjourned to 11.6.07 for evidence of the plaintiff. In the intervening period the plaintiff through her advocate had served copy of unaffirmed affidavit of of her examination in chief on the contesting defendants. On 8.6.07 the plaintiff handed over true copies of her affirmed affidavit of examination in chief to the defendants. On 11.6.07 the plaintiff tendered the affidavit of examination in chief dated 8.6.07 in the Court and the same was taken on record and marked as Exh.39. The contesting defendant Nos. 1, 2 and 5 to 9 filed an application for rejection of the plaintiff's affidavit of examination in chief on 11.6.07 as

the same was at variance with the copy of unaffirmed affidavit of examination in chief served on the contesting defendants. The trial Court passed an order on the said application and partly allowed the application. Thereafter on 14.6.07 the plaintiff filed chamber summons for amendment of the plaint. The rejection of said amendment application has given rise to the filing of present writ petition.

2. The City Civil Court has rejected the amendment application principally on the ground that the same is impermissible in view of the proviso to order 6 rule 17 of Code of Civil Procedure. The contesting defendants had contended that when the amendment application was moved the trial had already commenced and hence unless and until the plaintiff succeeds in establishing that despite exercise of due diligence it was not possible for her to raise the contention before the commencement of trial, the amendment application cannot be allowed. Accepting this submission of the defendants the trial Court has rejected the application.

3. The trial Court has categorically held that the plaintiff was very much aware of facts pleaded in the proposed amendment and thus could have pleaded the same in the plaint itself or at any rate, could have moved for amendment before the commencement of the trial. Learned senior advocate appearing for the petitioner has 'submitted that mere filing of an affidavit of examination in chief in the Court cannot be treated as commencement of trial. It is submitted that trial commences when a party deposes before the Court after administration of oath and as in the present case the plaintiff was yet to depose before the Court, it cannot be said that the trial had commenced. Per contra learned senior advocate appearing for contesting respondents has submitted that once issues are framed and the

case is set down for recording of evidence that the trial commences. It is further submitted that in the present case the plaintiff not only filed affidavit of examination in chief on record of the Court on 11.6.07 to a portion of which the defendants objected, but the plaintiff tendered the affidavit from the witness box and the same was taken on record and marked as Ex.39. Before I proceed to deal with the issue, it will not be out of place to extract the order sheet of the trial Court dated 11.6.07 :

"Date 11.6.07 Coram: H.H.J.Shri R.B.Malik

1997/06	Adv. Mr.Hiralal Thakkar with Mr.V.J.Shah i/by P.N.Tripathi &
Supreme	Co. for the plff.
Court Expdt.	Adv.Mr.Bhalekar for deft. no. 1, 2, & 5 to 9 i/by Nankani & Co.
	Adv.Mr.Pandit for deft. no.3.
	Adv. Mr.Bhadang for defts. no. 4 & 10 i/by Mehta & Co. and M.G.Gawde.
	Adv.Mr.Navnit Shah with Mr.Asrani for deftsno.11 & 13
Exh.38	Order below application dated 11/6/07
	Application disposed off.
	For the details, see the order separately made.
Exh.39	The plff tenders affidavit of examination in chief T.o.r. and marked as Exh.39.
Exh.40	The contesting defts presents another application for striking out some paragraphs examination in

chief.

Order passed.

Plff to say.

Exh.41 Plff addl.list of documents

Copy furnished to the ld adv for contesting deft.

Put up for consideration and orders on 12/6/07 at 11.00 a.m. Even as the cross examination was directed to commence it does appear that the application for striking out of paragraphs in Exh 39 (examination in chief) will have to be decided because, that would delineate the area of controversy.

The question of addl documents will naturally depend upon the finding of the court thereon.

The suit is therefore adjd to 12/6/07 for further hearing."

It can be seen from the above order sheet that on 11.6.2007 the suit was set down for recording cross-examination of the plaintiff.

4. Perusal of the impugned order passed by the City Civil Court clearly reveals that the plaintiff was very much aware about the facts pleaded in the amendment application much prior to the filing of amendment application. The trial Court has also found that the present amendment application was moved after the Court passed an order striking out some of the paragraphs from the affidavit of examination in chief of the plaintiff and also after an order was passed by the Court striking out some of the paragraphs from the written statement filed by the colluding defendants.

In other words, on account of striking out of a portion of affidavit of examination in chief and portion of written statement filed by colluding defendants, the plaintiff tried to fill in the lacuna by seeking to amend the plaint. It is clear from the order impugned that it was not seriously disputed before the trial Court nor is it seriously disputed before this Court that the plaintiff was aware of facts pleaded in the amendment application when it filed the plaint and at any rate before the commencement of trial. I am in agreement with the finding of fact recorded by the trial Court that had the plaintiff been diligent enough she could have pleaded the facts sought to be brought on record by proposed amendment earlier. Turning to the question as to whether the trial Court has committed a patent illegality or manifest error in rejecting the amendment application, warranting interference by this Court in exercise of its jurisdiction under Article 227 of the Constitution of India I proceed to examine the correctness of the order. The proviso to rule 17 disentitles a party from amending the pleadings after the trial commences unless and until it is shown that despite exercise of due diligence the party could not have pleaded the facts set out in the proposed amendment. Thus the main issue that arises is as to when did the trial commenced in the present suit? There are two judgments of the Supreme Court on the point as to when does a trial commence. The first judgment is in the case of ***Kailash*** v/s ***Nanhku and Others***, (2005) 4 SCC 480. In the said case the question that arose for consideration of the Supreme Court was as to when does a trial of election petition commence. While considering the said question the Supreme Court has compared the relevant position in civil suit vis-a-vis election petition and observed in para 13 as under:

> "13. At this point the question arises: when does the trial of an election petition commence or what is the meaning assigned to the word "trial" in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial."

The next judgment on which reliance is placed by the respondent is in the case of ***Ajendraprasadji N. Pande & Anr.*** V/s ***Swami Keshavprakeshdasji N. & Ors.***, 2006 (13) SCALE 525. The Supreme Court in the said judgment observed that under the proviso no application for amendment shall be allowed after trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. It was argued before the Supreme Court that "the affidavit filed under order XVIII rule 4 constitutes examination in chief". After considering the position in law, the Supreme Court in para 57 of its judgment observed thus:

> "57. It is submitted that the date of settlement of issues is the date of commencement of trial. (Kailash vs. Nankhu & Ors. (supra)). Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination in chief as date of commencement of trial, the matter will fall under proviso to order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. ...."

The Supreme Court then in para 60 proceeded to define precisely as to when does a trial commence :

> "As held by this Court in ***Kailash*** v/s ***Nanhku and Others***, (supra), the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence."

It is thus clear that when after framing of issues case is set down for recording of evidence, the trial commences and hence proviso to Order VI rule 17 would apply. In the present case issues were framed on 3.5.07 and the suit was set down for evidence on 11.6.07 i.e. prior to the filing of amendment application. ON 11.6.07 the plaintiff filed on record of the trial Court an affidavit of examination in chief and contesting defendants raised objection to some part of said examination in chief. It is thus clear that the trial in the present case commenced on 11.6.07. If this be the position, I do not find any illegality committed by the trial Court in holding that proviso to Order VI rule 17 would apply and unless and until the plaintiff demonstrates that despite exercise of due diligence she could not have raised the grounds pleaded in the proposed amendment earlier, the plaintiff's application cannot be allowed. On facts the trial Court has concluded that the plaintiff was aware and in know of the facts pleaded in the amendment application much prior to the filing of application. I do not find any fault with the said finding as well. In this view of the matter writ petition stands dismissed. Rule discharged.